

AUG 28 2002

Public Disclosure Commission

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

EVERGREEN FREEDOM FOUNDATION, ET AL,)

Plaintiff,)

vs.)

No. 02-2-00568-1

NATIONAL EDUCATION ASSOCIATION,)

Defendant.)

VERBATIM REPORT OF PROCEEDINGS
MOTION TO DISMISS

BE IT REMEMBERED that on the 23rd day of August, 2002, the following proceedings were held before the Honorable PAULA CASEY, Judge of the Superior Court of the State of Washington, in and for the County of Thurston.

The Plaintiff was represented by its attorney, Steven T. O'Ban;

The Defendant was represented by its attorney, John West;

WHEREUPON, the following proceedings were had, to wit:

Christy Lynn Sheppard, CCR
Official Pro Tem Court Reporter
(253) 566-1542

P-R-O-C-E-E-D-I-N-G-S

August 23, 2002

* * * * *

THE COURT: The first confirmed argument that we will begin with this morning is Evergreen Freedom Foundation versus National Education Association.

I think Ms. Strassberg is in a status conference in Judge McPhee's courtroom, so maybe we -- is she arguing today?

MR. WEST: No, I'm arguing, Your Honor, John West.

THE COURT: All right. If you will just identify who you are for the record, please.

MR. O'BAN: Good morning. My name is Steven O'Ban. I represent the plaintiff, Evergreen Freedom Foundation.

MR. WEST: John West, Your Honor, representing the defendant, National Education Association.

THE COURT: This comes on for a motion to dismiss, a motion for a stay, a motion for a preliminary injunction, and we will begin with the motion to dismiss.

And before doing so, I'm just interested in the

1 status of the case that was decided by Judge McPhee, in
2 that there is an appellate decision, I know, that is
3 before the Supreme Court on petition for review. And
4 I'm interested in what issues are before the Supreme
5 Court for review.

6 MR. O'BAN: Your Honor, the petition for
7 review has been filed. We have been told that a
8 decision as to whether the Supreme Court will accept
9 review may take some five months for them to render
10 that decision.

11 The issues in that case deal with a claim against
12 the Washington Education Association in 1996 who were
13 operating as a political action committee and dealing
14 with issues related to that matter.

15 THE COURT: And I guess my question is, there
16 was some rulings made with respect to the citizen
17 complaint, and are those issues before the Supreme
18 Court for review or not?

19 MR. O'BAN: Those may be before the Supreme
20 Court on review.

21 THE COURT: Well, may be?

22 MR. O'BAN: Well, the petition itself, with
23 certain base limitations, did not raise the issue of
24 the Supreme Court -- or excuse me, the Court of Appeals
25 decision on the citizen action, and 404 in terms of

1 this tolling issue that is obviously at the heart of
2 NEA's motion.

3 THE COURT: That was not in the petition for
4 review?

5 MR. O'BAN: That was not in the petition.

6 THE COURT: Okay. Thanks.

7 So I guess this is on NEA's motion to dismiss.

8 MR. WEST: Yes, Your Honor. Would you like
9 me to speak from here or at the podium?

10 THE COURT: Either place, the podium or your
11 table, whichever you prefer.

12 MR. WEST: If it's all right with you --

13 THE COURT: That's fine.

14 MR. WEST: Your Honor, as I'm sure you are
15 aware, this is a citizen action that is brought under
16 RCW 42.17.400, which alleges violation by NEA of
17 42.17.760, which is the statute that provides that
18 unions may not use agency fees to make contributions or
19 expenditures to influence an election or to operate a
20 political committee without obtaining affirmative
21 authorization.

22 Evergreen Freedom Foundation initiated these
23 proceedings with charges that it filed with the
24 Attorney General on the 31st of January of this year.
25 The Attorney General, a week later, referred those

1 charges to the Public Disclosure Commission for
2 investigation.

3 The Public Disclosure Commission investigated it.
4 NEA participated fully in that investigation, provided
5 many documents and a lot of information to the PDC.

6 The Public Disclosure Commission staff prepared a
7 report dated March 27th, some of which we agree with,
8 some of which we disagree with. That report was
9 forwarded by Assistant Director, Susan Harris, to the
10 members of the commission on April the 3rd, and the
11 commission scheduled a meeting to consider the staff's
12 recommendations for April the 9th. On April 8th, the
13 day before, Evergreen Freedom Foundation filed this
14 lawsuit.

15 And the issue that's presented by our motion to
16 dismiss is, whether a purported citizen action brought
17 under these circumstances is authorized by Section
18 42.17.400. If not, as we maintain, then the court has
19 no jurisdiction to entertain EFF's claims.

20 Now, the central issue here as, I think Your Honor
21 is aware from the question you asked initially, is the
22 decision of the Court of Appeals in the case of
23 Evergreen Freedom Foundation versus Washington
24 Education Association. That decision was issued ten
25 days or so after Evergreen filed this lawsuit. And

1 that decision makes clear that under the circumstances
2 that are presented here, a citizen action was not
3 appropriate.

4 The court says that when the Attorney General
5 refers citizen charges to the PDC for investigation,
6 this action tolls the statutory deadlines that
7 determine when the citizen action may be brought.

8 And it's clear why this makes sense. The purpose
9 of the citizen suit is to allow citizens to act if the
10 public authorities who have priority in prosecuting
11 these kinds of matters fail to do so.

12 But here what happened is that Evergreen brought a
13 lawsuit not because the public authorities had failed
14 to act, but to the contrary, they brought the lawsuit
15 to prevent the public authorities from acting.

16 The reason they did so is that they didn't like
17 the commission staff's recommendations to the Attorney
18 General that the Attorney General be asked to try to
19 settle these charges.

20 Now, we don't know, for one thing, whether the
21 commission itself would have agreed with the staff's
22 recommendations. But the key thing, whether they would
23 have or not, this is a decision -- how these charges
24 are going to be handled, what kind of prosecution is
25 appropriate, whether it's through initiating a judicial

1 proceeding, whether it's through an administrative
2 enforcement action brought by the PDC, whether it's
3 through an attempt to reach an amicable settlement, a
4 negotiated settlement -- this is a decision for the
5 public authorities to make.

6 And the statute doesn't authorize a citizen to
7 bring a citizen's action simply because it disagrees
8 with the prosecutor's judgment about how to handle the
9 case. That kind of action is authorized only if the
10 public authorities fail to act at all.

11 So the Court of Appeals reading of the statute, as
12 tolling the statute of -- not the statute of
13 limitations, but tolling the deadlines that govern when
14 a citizen action may be brought while the matter is
15 under consideration by the Public Disclosure
16 Commission, is not only what the Court of Appeals says,
17 which in a sense ended this matter, I believe, as far
18 as this court is concerned, but it also is an
19 interpretation of the statute that makes sense.

20 Now, Evergreen's arguments -- I'm not going to
21 respond to everything that they said. We submitted a
22 reply brief a week ago, Your Honor, which responds in
23 some detail to them. And to the extent necessary, if I
24 have an opportunity for rebuttal after Mr. O'Ban
25 speaks, I will address whatever he may say. I would

1 just like to make two points here in response to their
2 arguments.

3 First of all, as to their reading of the Court of
4 Appeals opinion, Evergreen says that when the Court of
5 Appeals refers to the Attorney General forwarding the
6 allegations to the PDC for investigation, that what it
7 really meant was forwarding the allegations for
8 investigation and the PDC initiating an enforcement
9 action.

10 Well, no, this is, I argue, a totally implausible
11 reading of the opinion. First of all, it's not what
12 the court says, it's not even close to what the court
13 says. And the court went on in the very next sentence
14 to talk about filing administrative charges. It said,
15 "Further" in introducing that discussion, clearly
16 talking about something additional beyond what it had
17 been talking about in the previous sentence.

18 And, finally, the court made quite clear in its
19 opinion that filing administrative charges by the
20 Public Disclosure Commission didn't simply toll the
21 statutory deadlines, it extinguished the right to bring
22 a citizen's action, just the same as would be the case
23 if the Attorney General had filed a lawsuit.

24 So if the court really had, when they said
25 forwarding the matter to the Public Disclosure

1 Commission for investigation tolls the deadlines, it
2 makes no sense to say that if what you really mean when
3 you say forwarding it to the PDC, is forwarding it to
4 the PDC and the PDC investigating.

5 If that's what happened, the right to bring a
6 citizen's action is not just tolled, it's extinguished,
7 you know. So it makes no sense to talk about tolling
8 if that's what you had meant.

9 It's quite clear that the Court of Appeals said
10 two things. It said that when the Attorney General
11 forwards charges to the PDC for investigation that
12 tolls the statutory deadlines. And, then,
13 subsequently, if the PDC acts on those charges by
14 initiating an administrative enforcement proceeding,
15 the right to bring a citizen's action is extinguished.

16 Evergreen's interpretation would simply read the
17 first part of that out of the Court of Appeals opinion.

18 THE COURT: And do you read the opinion to
19 mean that if the PDC would have chosen not to bring
20 administrative action, that the citizen action could
21 have proceeded then?

22 MR. WEST: If they had chosen not to do
23 anything at all.

24 THE COURT: Well, how about if they had
25 chosen at their meeting not to take administrative

1 action?

2 MR. WEST: Well, let me just -- I think that
3 the citizen action would not have been precluded if
4 they had chosen what the staff had recommended, which
5 is that the matter be referred back to the Attorney
6 General with the view of attempting to negotiate a
7 settlement. This is still public authorities
8 attempting to resolve this matter through the judicial
9 system. Any kind of settlement would have been a
10 settlement that would have been legally binding on all
11 parties, including possible third parties wanting to
12 act under --

13 THE COURT: My question is, do you think that
14 that procedure would have precluded a citizen action?

15 MR. WEST: If they had done that, that would
16 have precluded a citizen action. If they had -- if
17 they had -- in our view, that would have been exactly
18 the same kind of situation as if they had referred the
19 matter to the Attorney General for the filing of a
20 lawsuit.

21 In either case, the matter is still under
22 consideration by the public authorities, by the
23 Attorney General, and by the Public Disclosure
24 Commission.

25 Certainly it's clear nobody has even disputed, not

1 even Evergreen, that if the Attorney General files a
2 lawsuit at the end of this proceeding, then there is no
3 right to a citizen action.

4 Evergreen agrees that if the Attorney General --
5 if the Public Disclosure Commission initiates an
6 enforcement action, there is no right to bring a
7 citizen action either. They don't agree with that as a
8 matter of statutory interpretation, but they agree that
9 that's what the Court of Appeals said.

10 And I think it also follows from this, that if the
11 Public Disclosure Commission refers the matter to the
12 Attorney General with the recommendation that you try
13 to negotiate a settlement, first of all, the Attorney
14 General may or may not have followed that advice. They
15 may have decided, well, we want to file a lawsuit.

16 But in any event, if there is some judicially
17 cognizable action that is taken by the public
18 authorities, including reaching a negotiated -- a
19 legally binding, negotiated settlement, in our view
20 that would extinguish the right to a citizen action.
21 And while the action that is going to be taken is being
22 considered, the deadlines are tolled.

23 Judge, have I answered your question?

24 THE COURT: Yes.

25 MR. WEST: Your Honor, the only other thing

1 that I wanted to touch on with regard to Evergreen's
2 arguments is their suggestion that the decision of the
3 Court of Appeals -- they go through a number of
4 arguments, they say plain language of the statute, the
5 purpose of the statute, what the Public Disclosure
6 Commission thinks the statute means, or thought the
7 statute means before this decision came down, all of
8 these really amount to an argument that the Court of
9 Appeals decision was wrongly decided.

10 And, of course, that's not something that this
11 court has the latitude -- an argument that this court
12 has the latitude to entertain. We explained in our
13 brief why, even if we take these arguments that they
14 make on their own terms, they don't have any merit.
15 And I won't go through those again at this point, but
16 we will leave it at that point unless Your Honor has
17 further questions.

18 THE COURT: No.

19 MR. O'BAN: Good morning, Your Honor.

20 THE COURT: Good morning.

21 MR. O'BAN: The voters, when they first
22 enacted public disclosure legislation back in 1972 or
23 1974, enacted also 400, sub 4. This is an action
24 right. And clearly the voters felt an important
25 component to a vigorous enforcement of that law was

1 that a citizen should have the right to bring an
2 enforcement action where government officials either,
3 because they are reticent to enforce the laws for
4 political reasons, or have underfunded the Public
5 Disclosure Commission, fail to bring a lawsuit or
6 vigorously enforce a lawsuit. The citizen right is
7 there as a check against that, and I think we all
8 understand, in some cases, maybe a reticence to
9 aggressively pursue an enforcement action. Such is the
10 case here. And I will talk more about the events of
11 April 8th in just a moment.

12 But, of course, what's at the heart of this
13 question is: What does 404 mean by "commence an
14 action"? That's the language that the Court of Appeals
15 and EFF versus WEA was construing there in Section C of
16 its opinion. And, of course, it's only Section C of
17 the opinion that the NEA is relying upon for their
18 motion today.

19 I would like to look at that Section C. I don't
20 know if you have a copy of that in front of you, Your
21 Honor, but --

22 THE COURT: I have the decision.

23 MR. O'BAN: Okay. I'm looking at Section C
24 on page -- beginning at 604 of the Washington Appellate
25 Reports. And as with any opinion, it begins -- and I'm

1 looking at page 604 and 605, with a recitation of the
2 facts which underlie the ultimate holding of the
3 opinion in that section. And those facts, and I will
4 just summarize them, are as follows:

5 The Court of Appeals felt it was important to
6 mention that; number one, the AG had referred EFF's
7 allegations to the PDC; that the PDC had commenced an
8 enforcement action; that the PDC had -- because it had
9 commenced that enforcement action the AG had decided
10 not to file its own lawsuit, it had deferred to the
11 PDC's enforcement action; and finally, the Court of
12 Appeals cited to the fact that the AG had notified EFF
13 that it could not file suit because the PDC started an
14 enforcement action.

15 These were, to the Court of Appeals, the essential
16 facts it needed to discuss to support its ultimate
17 holding.

18 The court goes on to frame the issue. Three
19 paragraphs later it says, under "language of the act,"
20 in that section it said, "EFF argues it should be
21 allowed to bring a citizen action because neither the
22 Attorney General or prosecutor commenced an action,
23 rather the Public Disclosure Commission commenced an
24 action against the WEA. And the court goes on to
25 discuss the power of the PDC to commence such actions,

1 and then to its holding, the section that we are all
2 talking about here today. And in that holding it again
3 cites to two key facts that support its holding, and
4 I'm looking at page -- I guess that would be 606 of the
5 Washington Appellate Reports.

6 It says, "Here before the ten-day period had
7 passed after the second letter to the AG, the AG
8 forwarded the allegations to the PDC. This was
9 appropriate action for the AG to take. It tolls the
10 ten-day deadline."

11 "Further" -- this is the second fact that the
12 court reiterates as necessary to its holding -- "the AG
13 deferred to the charges that the PDC filed as
14 appropriate."

15 And then the last sentence of the holding, and
16 here's the holding, because of those two essential
17 facts; referral to the PDC by the AG, and because the
18 PDC had commenced an action and the AG was deferring to
19 that action, it says, "Because the AG acted before the
20 end of the ten-day period, EFF could not bring a
21 citizen's lawsuit."

22 It's saying that this is what extinguishes EFF's
23 right to bring a citizen's action. It is the referral,
24 and it is the fact that the PDC brought an enforcement
25 action. That's where the holding is.

1 And what the NEA would like the court to do is
2 read out of this opinion, this sentence that begins,
3 "Further, the AG deferred to the charges." And it
4 would like to say that the holding, beginning with,
5 "Because the AG acted," that that follows immediately
6 after the line about referral by the AG, that tolls the
7 ten-day deadline.

8 The holding begins with that sentence, "Because
9 the AG acted," and it brings into its holding those two
10 key facts.

11 So our point here, Your Honor, is that necessary
12 to the Court of Appeals holdings were two important
13 elements; one was the referral to the AG; and two was
14 that the PDC had brought an enforcement action that the
15 AG made a decision, a conscious decision, to defer to.
16 And that is specifically mentioned by the Court of
17 Appeals here when it discusses this December 12 letter
18 that the AG sent to EFF.

19 The AG could have done two things. It could have
20 commenced its own action after that investigation
21 concluded, or it could have deferred to the PDC's
22 enforcement action that had taken place, and that took
23 place before the ten-day period lapsed.

24 So our point is those two key facts must exist
25 before a court could find that the citizen's action has

1 been extinguished.

2 Missing from this case is that second key
3 condition. The Public Disclosure Commission, to this
4 day, and the AG for that matter, has never filed an
5 enforcement action. The investigation -- which counsel
6 for the NEA talks about is important for the PDC to be
7 allowed to do and that's why we have this tolling
8 protection -- that investigation concluded on March
9 27th, 2002.

10 The executive director, as we mentioned in our
11 papers, had the authority on her own, apart from the
12 commission, she has the authority under the WAC
13 39.37.060, we mentioned that in our brief, Your Honor,
14 to commence an enforcement action.

15 She could have done that on March 27th. She could
16 have done it on March 28th. She could have done it at
17 any time up to the day when EFF commenced its action in
18 this court. She failed to do so.

19 The PDC had plenty of time to do their
20 investigation. They completed their investigation.
21 And there was a space of some ten days before EFF filed
22 its action in this court that it could have commenced
23 that enforcement action.

24 The reason the executive director failed to do so
25 is given by her assistant director in the report which

1 we have attached to our materials and which the NEA
2 attached to their materials, and that is -- it's
3 actually Exhibit D to Mr. Wilcot's declaration
4 beginning at page 3.

5 This is the Assistant Director Harris, at the
6 conclusion of the investigation she writes, "If a
7 settlement cannot be reached, staff do not recommend
8 that the AG proceed with litigation, based on current
9 cutbacks and the cost of litigation."

10 PDC, of course, has to pay for -- or what I should
11 say is, the AG bills the PDC for the litigation cost.
12 So it's important for the staff to be able to say to
13 the AG, if we refer this to you, we don't want you to
14 litigate this, we want you to settle it because we
15 can't afford -- because we are underfunded -- we can't
16 afford to have you commence an enforcement action.

17 So from the get-go the PDC telegraphed that it had
18 no intention of filing an enforcement action or
19 authorizing the Attorney General to do so.

20 The point here is that, again, we are now five and
21 a half some months later after the PDC met, and after
22 we filed our lawsuit, and after the Court of Appeals
23 decision was handed down, and to this day the PDC has
24 never brought an enforcement action.

25 So whether you agree with our analysis, frankly,

1 or whether you agree with the NEA's analysis there was
2 some sort of tolling period to give the PDC the
3 opportunity to bring some sort of an enforcement
4 action, we are five months down the road and no such
5 action has been --

6 THE COURT: Tell me again what day the
7 ten-day notice was given.

8 MR. O'BAN: The ten-day notice -- well, it
9 was in our materials. I believe it was late February,
10 Your Honor. I'm sorry, I don't have the date in my
11 mind.

12 THE COURT: Well before April?

13 MR. O'BAN: Oh, yes, well before April. I
14 will get you that date in just a moment, Your Honor,
15 it's in our materials but it was well before April.

16 MR. WEST: March 22.

17 MR. O'BAN: Oh, thank you. March 22.

18 We discussed the PDC's position on this issue and
19 the AG's position on this issue. We have included
20 letters from the AG and included testimony from the
21 Public Disclosure Commission's executive director about
22 how they understand that the enforcement action has to
23 be commenced within that 45 day or plus ten-day period.

24 We included all that information not because we
25 want the court to side with the PDC over the Court of

1 Appeals, but our point is that the NEA has suggested a
2 certain interpretation of the EFF-WEA decision from the
3 Court of Appeals. We think they have got that
4 interpretation wrong. I just told you what we believe
5 the interpretation to be.

6 And my point is that the PDC and the AG side with
7 our interpretation, and that is that an enforcement
8 action has to be commenced before that ten-day period
9 expires, otherwise the citizen action rights spring
10 forward and the citizen has the right, as it does in
11 this case, to enforce the law.

12 The failure to, I think, ignore the PDC and the AG
13 and adopt the NEA's interpretation results in a number
14 of really absurd and unintended consequences here. One
15 of which is, we as lawyers, I think, have always
16 understood "commence an action" to be just that,
17 commencing a lawsuit in which the plaintiff is seeking
18 to enforce certain rights or protect certain rights.

19 Section 410 of the Public Disclosure Commission
20 which sets forth the statute of limitations, of course,
21 uses the same language. You have to commence an action
22 within five years or the lawsuit to enforce the law is
23 time barred.

24 Well, under the NEA's interpretation here of EFF
25 versus WEA, that means that the referral of an

1 investigation alone will toll that statute of
2 limitations.

3 The statute could not be more clear. It's not any
4 action which extinguishes the right of the citizen
5 action, it's the commencement of an action. The same
6 language that we all understand deals with how we
7 interpret and apply a statute of limitations time bar.

8 Finally, if we were to accept the NEA's
9 interpretation as I understand it, it means that the
10 ten-day period was tolled on the day that that matter
11 was referred over to the PDC.

12 Well, how long has it been tolled? We are five
13 months out now. Is it still tolled? At some point
14 surely, the tolling stops when enough time is lapsed
15 and the PDC has not brought enforcement action or the
16 AG has not brought enforcement action, something they
17 certainly could have done if they had adopted the NEA's
18 interpretation of EFF versus WEA.

19 THE COURT: Can you tell me what the
20 difference is in the ultimate outcome as to whether
21 this action is conducted someplace else or here because
22 any action at the administrative agency was appealable,
23 I assume or not?

24 MR. O'BAN: I would have to assume that was
25 so.

1 THE COURT: Maybe not, because you are not a
2 party to --

3 MR. O'BAN: I'm afraid I don't know.

4 Are you talking about if an administrative
5 action --

6 THE COURT: Why is this such an important
7 issue to EFF as to whether you are bringing this action
8 or whether it is being brought by the PDC?

9 MR. O'BAN: Well, I think for one primary
10 reason, Your Honor, is that we believe the Public
11 Disclosure Act should be enforced vigorously, and we
12 are on record as having attempted to do that in other
13 scenarios against the WEA, which has been fined a
14 number of hundreds of thousands of dollars, largely
15 through EFF's efforts.

16 The point, though, is that when we saw the staff's
17 recommendation to the commission not to litigate this,
18 to settle this at all costs, because of -- and I
19 understood this, because of their budgetary
20 constraints -- and at the same hearing, by the way,
21 they were authorizing the litigation against permanent
22 offense and Mr. Eyman, that was no doubt going to be an
23 expensive proposition for them -- due to budget
24 constraints they did not have the wherewithal to
25 vigorously enforce this law against the NEA.

1 And so because of that concern we brought this
2 lawsuit. Thank you.

3 THE COURT: Well, let me ask you the same
4 questions that I asked Mr. West.

5 So if the PDC had met on April 9th and determined
6 not to proceed with its own enforcement action but to
7 tell the Attorney General to negotiate, do you believe
8 that at that point -- well, what do you believe the
9 situation would have been at that point? That was the
10 decision, not to act, so the citizen complaint would
11 have been permissible?

12 MR. O'BAN: Well, my point really, Your
13 Honor, is that's precisely what happened. They did
14 meet and they elected not to bring an enforcement
15 action that day.

16 THE COURT: But wasn't that because you had
17 filed your suit?

18 MR. O'BAN: Not necessarily. The staff had
19 already said they did not have the financial
20 wherewithal to prosecute this action. For all we know,
21 one of the motivating factors for the commission not to
22 bring an action that day or subsequent to that point
23 after the EFF-WEA decision came down, was that they
24 just don't have the financial ability to bring such a
25 lawsuit against such a big player like the NEA.

1 My point, Your Honor, is that's precisely what
2 happened. Motivations may be in doubt, but they
3 decided not to bring an enforcement action, not to
4 refer it to the AG. And nothing has changed since
5 then.

6 THE COURT: Okay. I'm going to let Mr. West
7 briefly respond.

8 MR. WEST: I'm going to come up here this
9 time, Your Honor, if you don't mind.

10 On this last question, what the staff recommended,
11 which the commission may or may not have accepted, was
12 that it be referred back to the Attorney General, and
13 they had a suggestion as to how it ought to be handled
14 by the Attorney General.

15 It's quite conceivable that the Attorney General
16 would have field a lawsuit in order to have a basis for
17 settling it, put more pressure on us to settle. They
18 may have chosen to try and negotiate a settlement. We
19 don't know how that would have happened.

20 But in any event, this was one of the means by
21 which the resolution of these charges, with binding
22 effects on all parties, could have been achieved.

23 Let me come back, if I may, to Mr. O'Ban's
24 discussion of the facts that were before the Court of
25 Appeals.

1 The facts were different, that's certainly true.
2 And an enforcement action had been initiated in the
3 case that was before the court, but the court says two
4 things in its opinion. It says, first of all, that the
5 deadlines were tolled by the Attorney General --

6 THE COURT: Can you just refer me to that
7 provision again, because I read it but I can't seem to
8 find it right now.

9 MR. WEST: Of the opinion?

10 THE COURT: Yes, of the opinion. And my
11 numbering, the version I have, is numbered differently
12 than Mr. O'Ban's.

13 MR. WEST: I'm sorry. I'm actually reading
14 it from my reply brief where I have, I think, the --

15 MR. O'BAN: Do you want to look at this?

16 THE COURT: Sure.

17 MR. O'BAN: It's Section C there, beginning
18 there.

19 MR. WEST: Okay. The court says, "Here
20 before the ten-day period had passed after EFF's second
21 letter to the AG, the AG forwarded the allegations to
22 the PDC for investigation. This was appropriate action
23 for the AG to take and it tolls the ten-day deadline."
24 That's the critical part as far as this case is
25 concerned, I believe.

1 "Further," in other words, beyond that action,
2 "Further, the AG deferred to the charges that the PDC
3 filed as appropriate under RCW 42.17.401 and 42.17.395.
4 Because the AG acted before the end of the ten-day
5 period, EFF could not bring a citizen's lawsuit under
6 42.17.404 and the trial court properly denied EFF's
7 motion to amend its pleadings."

8 We would submit, Your Honor, and I think it is
9 quite clear from this, that the court is saying two
10 things. First of all, it's saying that when the AG
11 referred the matter to the PDC for investigation and
12 consideration, that this tolled the deadlines. And
13 then when the AG -- excuse me, when the Public
14 Disclosure Commission acted by bringing an enforcement
15 action, that the right to bring a citizen's lawsuit was
16 extinguished.

17 On Mr. O'Ban's reading, what conceivable -- his
18 understanding of this is that because the -- that all
19 the court is saying here is that because that -- you
20 have to have both of these, you have to have both the
21 referral to the PDC, and you have to have the PDC
22 bringing an enforcement action.

23 And that the only reason that the right -- that
24 there was no right to bring a citizen's action is
25 because both of those things occurred. But on that

1 reading, what conceivable meaning does the statute
2 about tolling have. If you are saying that you have to
3 have the beginning of enforcement action --

4 THE COURT: There is not a statute about
5 tolling. Do you mean the language?

6 MR. WEST: I'm sorry. I apologize. The
7 court's language about tolling. That sentence where it
8 says that this was appropriate action to take and it
9 tolls the ten-day deadline.

10 On Mr. O'Ban's reading, you have to bring the --
11 to extinguish the right to a citizen's action, you have
12 to bring the enforcement action within the 45-day
13 period or the extended ten-day period in order to do
14 that so there is no question of deadlines being tolled.
15 The language that says the deadlines are tolled when
16 it's referred to the PDC for investigation, simply has
17 no meaning whatever under Evergreen's reading of the
18 opinion.

19 So the way I would read this, which I think makes
20 a lot more sense, is there are indeed two things here.
21 There was the forwarding of it to the Public Disclosure
22 Commission for investigation, and there was the
23 initiation of enforcement action. And either of these
24 is sufficient, on the facts of that case, to mean that
25 they couldn't bring their citizen's action.

1 The first, because the deadlines were tolled while
2 it was under investigation, and the second, because the
3 right to bring a citizen's action was extinguished when
4 enforcement action was begun.

5 The second holding there, the second part of that
6 holding, doesn't apply in this case, but the first one
7 certainly does. And there is absolutely no conceivable
8 reason for saying that the deadlines were tolled under
9 Mr. O'Ban's understanding of what the court is saying.

10 THE COURT: I will just have you wrap up.

11 MR. WEST: Okay. Let me just say one more
12 thing really quickly. As far as when this tolling
13 ends, if the Public Disclosure Commission referred this
14 back to the Attorney General for settlement as the
15 staff had recommended they do, and suppose that no
16 settlement had been reached, and finally the Attorney
17 General simply drops the matter with no action being
18 taken, then they clearly can bring their citizen
19 action. There's been no official action, the tolling
20 ends when the Attorney General -- when the public
21 authorities end their consideration of this matter.

22 They say that the Public Disclosure Commission
23 still hasn't brought enforcement action after five
24 months, so obviously they are waiting for this court to
25 decide this motion to dismiss.

1 And we would expect and hope that if Your Honor
2 agrees with us and dismisses the case, that we will be
3 right back where we were on April the 9th, and the
4 Public Disclosure Commission and the Attorney General,
5 the appropriate public authorities, will continue this
6 matter which we hope certainly we can settle with them.

7 In any event, at the time that they brought this
8 lawsuit on April 8th, clearly the deadlines were tolled
9 and the court has no jurisdiction to consider the
10 matter having been brought at that time without
11 statutory authorization.

12 Thank you, Your Honor.

13 THE COURT: Let me say that as I did my
14 preparation for this argument and ruling today, I have
15 been troubled by the dilemma that I am faced with. The
16 Court of Appeals, in the case of Evergreen Freedom
17 Foundation versus Washington Education Association, has
18 rendered an opinion since the filing of this lawsuit
19 that is argued by defendants to be directly on point
20 and control the outcome of this lawsuit, and is argued
21 by the plaintiffs to have facts different than this
22 case, precluding its applicability here.

23 And I agree with the plaintiffs to this extent,
24 that the facts of this case are quite different than
25 the WEA case. And I believe that the Court of Appeals

1 has made an overbroad ruling, but in the language of
2 the opinion by the Court of Appeals, it seems to --
3 their language seems to apply to the case that's before
4 me today.

5 The WEA case that the Court of Appeals decided, of
6 course, had a matter that was referred by the Attorney
7 General's office to the Public Disclosure Commission,
8 and an action initiated by the Public Disclosure
9 commission within the ten-day period, which precluded a
10 citizen action and the amendment of the complaint in
11 that matter.

12 And so I do not argue with the outcome of the
13 Court of Appeals decision, it seems very appropriate
14 that the citizen action was precluded because of both
15 of those actions that were taken by the Public
16 Disclosure Commission after the referral from the
17 Attorney General's office.

18 In this case we have a matter referred by the
19 Attorney General's office to the Public Disclosure
20 Commission for investigation. And at the end of the
21 ten-day period no further action had been taken, either
22 by the Attorney General's office or the Public
23 Disclosure Commission, no action had been initiated in
24 front of the PDC, and no action had been initiated in
25 court.

1 So by a general reading of the statute it would
2 seem that this citizen action was appropriate. And I
3 agree with the plaintiffs that I think the PDC and the
4 AG thought the citizen action was probably appropriate.

5 But after April 8th, when the citizen action was
6 initiated, this Court of Appeals decision came down.
7 And its language specifically says that, "The referral
8 from the Attorney General's office to the Public
9 Disclosure Commission for investigation tolls the
10 ten-day deadline."

11 It wasn't necessary for the Court of Appeals to
12 make that finding for the outcome in the WEA case. I
13 am searching for how they have arrived at that
14 conclusion. But I believe, as a superior court in
15 division two, that I must follow their ruling and I
16 believe that was part of their ruling.

17 And accordingly, I believe that means the citizen
18 action must be determined to be premature in this case,
19 because the Court of Appeals has determined that the
20 simple referral by the Attorney General's office to the
21 Public Disclosure Commission for investigation has
22 tolled the ten-day deadline and it has not extinguished
23 the right of the citizen action, but has simply
24 extended the time for its filing.

25 So that would seem to me to mean that this case

1 must be dismissed. I think it's unnecessary to make
2 other gratuitous comments about the nature of this
3 lawsuit, but I'm going to make a couple anyway.

4 Every single day, individuals who make decisions
5 about whether to file a lawsuit or not file a lawsuit
6 do so on the basis of whether they can afford to do so.
7 So it is not uncommon for us to see that lawsuits are
8 not filed because an individual can't afford to file
9 that lawsuit.

10 But in this case, a government agency charged with
11 the enforcement of the Public Disclosure law, has a
12 staff recommendation at least, that a lawsuit which
13 would otherwise be appropriate not be pursued because
14 of the cost of litigation. And it is now being argued
15 that their choice to make that decision not to pursue
16 this lawsuit may preclude a citizen action in this
17 case, which is also authorized by law.

18 And I hope that that outcome is one that is not
19 the ultimate outcome of this case.

20 MR. O'BAN: Can I ask a clarifying question
21 then? So you -- by saying "premature" you are saying
22 that the action of the citizen's right is tolled, not
23 extinguished?

24 THE COURT: That is correct.

25 MR. O'BAN: Does the court have any guidance

1 as to how long a matter is tolled? What is a
2 reasonable time for tolling an action at which time if
3 enforcement action hasn't taken place?

4 THE COURT: Well, I would expect you to be
5 back here immediately unless something happens as a
6 result of this ruling and the matter being referred
7 back to PDC. I mean quickly.

8 MR. O'BAN: So by their next meeting, if they
9 haven't dealt with this issue then we could be back
10 here?

11 THE COURT: I'm not making any ruling with
12 respect to that, but it would be my expectation if they
13 didn't do something at their next meeting that would be
14 some evidence that they are intending to act.

15 MR. O'BAN: Thank you.

16 MR. WEST: Thank you, Your Honor.

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18 (Proceedings concluded.)
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CERTIFICATE

) I, CHRISTY SHEPPARD, a duly
) authorized Notary Public,
 STATE OF WASHINGTON) ss COUNTY OF PIERCE, in and
) for the State of Washington,
) residing at Buckley, do
) hereby certify:

That the foregoing proceedings were transcribed by me
 and completed on the 23rd day of August, 2002 and thereafter
 were transcribed under my direction;

That I am not a relative, employee, attorney or
 counsel of any party to this action or relative or employee
 of any such attorney or counsel and that I am not
 financially interested in the said action or the outcome
 thereof;

IN WITNESS WHEREOF, I have hereunto set my hand and
 affixed my official seal the 27th day of August 2002.

Notary Public in and for the
 State of Washington, residing
 at Buckley.